IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-777

CLEVELAND BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

JO CAROL LaFLEUR, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

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February 1973

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This Supplemental Brief is being filed pursuant to Rule 24(5) of the Rules of this Court.

One federal appellate decision and one state supreme court decision bearing on the issue now before this Court have been rendered since Respondents filed their Brief in Opposition on December 26, 1972. Respondents therefore now file this Supplemental Brief.

In *Green v. Waterford Board of Education*, Case No. 72-1676, the Second Circuit Court of Appeals, on January 29, 1973, held a mandatory maternity rule requiring a teacher to take a leave without pay "not less than four months prior to expected confinement or at such earlier time as a replacement becomes available" to be in violation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the U.S. Constitution. This order reversed the decision of the District Court for the District of Connecticut, which had dismissed the plaintiff's complaint. (The opinion of the District Court is reported at 5 FEP Cases 116.)

The Second Circuit points out that while men do not become pregnant, they:

> . . . are also subject to crises of the body, some of which, like childbirth, give ample warning: A cataract operation or a prostatectomy, for example, may be planned months ahead. Because male teachers are not forced by defendant Board to take premature leave because of a known forthcoming medical problem, female teachers should not be treated differently. Thus stated, the argument is persuasive, even compelling. One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed. (p. 1730, slip opinion of the Court.)

The Court in *Green* also has commented directly on the *LaFleur* case, stating:

> An additional state interest–avoiding "classroom distractions" caused by embarrassed children "pointing, giggling, laughing and making snide remarks" about their teacher's condition–emerges from one of "the several cases" to which defendants

refer.[16] We regard any such interest as almost too trivial to mention; it seems particularly ludicrous where, as here, plaintiff taught only high school students. Whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word.

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[16] *LaFleur v. Cleveland Bd. of Educ.*, 326 F. Supp. 1208, 1210, 1213 (N.D. Ohio 1971). As we note below, this decision was reversed by the Court of Appeals for the Sixth Circuit. (pp. 1732-1733, Slip Opinion of the Court.)

The Supreme Court of Pennsylvania has also recently invalidated a school board's mandatory maternity rule requiring teachers to resign no later than the end of their fifth month of pregnancy. In *Cerra v. East Stroudsburg Area School District*, No. 359 (Pa. Sup. Ct. Jan. Term, 1972), decided January 19, 1973, the State Supreme Court reversed the Pennsylvania Commonwealth Court below. (The opinion of the appellate Court is reported at 4 CCH EPD ¶ 7607.)

While the Supreme Court of Pennsylvania found it unnecessary to consider whether the mandatory leave policy violated the Fourteenth Amendment (holding the rule to be violative of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §955(a)), its opinion is nevertheless of relevance to the present case. The Pennsylvania Court found that "... Mrs. Cerra and other pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple, since 'Male teachers, who might well be temporarily disabled from a multitude of illnesses, have not and will not be so harshly treated.' " (p. 6 of slip opinion.)

Although Petitioners argue in their Supplemental Brief that the decision of the Fourth Circuit on January 15, 1973, in *Cohen v. Chesterfield County School Board*, Case No. 71-1707, creates a conflict with the Sixth Circuit Court of Appeals, Respondents do not believe any lack of common view between these two circuits to be of sufficient importance to warrant the granting of a Writ of Certiorari. The *Cohen* reversal, a four to three decision, appears to be the act of a court in isolation: Respondents have been unable to find any other federal court,[1] or any state court of final jurisdiction upholding a school board's mandatory maternity leave policy. Federal district courts are now uniformly holding rules requiring a school teacher or a non-teaching employee of a school board to take a maternity leave of absence otherwise than when medically necessary to be a violation of equal protection. *Bravo v. Board of Education*, 345 F. Supp. 155 (N.D. Ill. 1972); *Pocklington v. Duval County School Board*, 345 F. Supp. 163 (M.D. Fla. 1972); *Monell v. Department of Social Services*, 4 CCH EPD ¶7765 (S.D.N.Y. 1972); *Williams v. San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Cal. 1972). For this reason, and for others already stated by Respondents in their Brief in Opposition, there therefore appears to be no need for this Court to review the Sixth Circuit's decision in the present case.

For the Court's convenience, the opinion of the Second Circuit Court of Appeals in *Green, supra*, is

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[1] Those few district courts that have upheld mandatory maternity leave policies of school boards have all been reversed on appeal. *See, Green v. Waterford Bd. of Education, et al.*, No. 72-1676 (2d Cir. Jan. 29, 1973); *LaFleur v. Cleveland Bd. of Education, et al.*, 465 F.2d 1184 (6th Cir. 1972).

attached hereto as Appendix A. The Pennsylvania Supreme Court's opinion in *Cerra, supra,* is set forth in Appendix B.

CONCLUSION

For the reasons set forth above, Respondents respectfully pray the Court to deny the Petition for Certiorari.

Respectfully submitted,

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February 1973

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 213—September Term, 1972.

(Argued December 6, 1972 Decided January 29, 1973.)

Docket No. 72-1676

PRISCILLA B. GREEN,

Appellant,

—against—

WATERFORD BOARD OF EDUCATION, *et al.*,

Appellees.

Before:

LUMBARD, FEINBERG and MANSFIELD,

Circuit Judges.

Appeal from order of United States District Court for the District of Connecticut, M. Joseph Blumenfeld, *Chief Judge,* dismissing complaint under 42 U.S.C. § 1983 seeking damages for loss of salary on grounds that mandatory maternity leave rule violates equal protection clause.

Reversed and remanded.

MARTIN A. GOULD, Hartford, Conn. (Gould, Killian & Krechevsky, on the brief) *for Appellant.*

MELVIN SCOTT, New London, Conn. (C. George Kanabis, Narcyz Dubicki, Traystman, Scott, Kanabis & Shea, on the brief) *for Appellees.*

FEINBERG, *Circuit Judge:*

Plaintiff Priscilla B. Green, a school teacher, was forced by defendant Board of Education of the Town of Waterford, Connecticut, to take a leave of absence without pay from her job because of pregnancy, although she wanted to teach another two and one-half months and claimed to be able to do so. Arguing that the Board's inflexible maternity leave provision denied her the equal protection of the laws, plaintiff brought a civil rights action, 42 U.S.C. § 1983, in the United States District Court for the District of Connecticut. Chief Judge M. Joseph Blumenfeld dismissed plaintiff's complaint, and she appeals. We conclude that plaintiff stated a valid constitutional claim, and we reverse and remand for further appropriate proceedings.

I

The facts of the case are simple and in large part undisputed. In early September 1971, plaintiff was a nontenured teacher of English at Waterford High School under a one-year employment contract with the Waterford Board of Education. At that time, she informed the principal of Waterford High School that she was pregnant, that her due date was about mid-February 1972, and that she wanted to continue teaching until January 31, 1972, which she characterized as the end of the first semester. Shortly thereafter, the Waterford Superintendent of Schools, defendant Charles J. Cupello, told plaintiff that her leave would start as soon as a suitable replacement could be found. Plaintiff tried to persuade the Board to let her continue to teach until the end of January, but this effort was fruitless. In a letter dated October 15, 1972 the Superintendent notified plaintiff that the Board had voted to grant her request for a maternity leave of absence "effective at such time as a suitable, certified replacement may be secured,"

in accordance with Article XIV of an agreement between the Board and defendant Waterford Education Association, the collective bargaining agent for teachers. The provisions of Article XIV, referred to in the letter, are set forth in the margin.[1] The key portion requires a maternity leave without pay to begin "not less than four months prior to expected confinement or at such earlier time as a replacement becomes available." Thereafter, the Superintendent notified plaintiff that a replacement had been secured, who would assume plaintiff's classroom duties on November 17, 1971, "at which time your maternity leave will commence." Soon after, plaintiff brought this suit in the district court.

The basis of plaintiff's action is that a mandatory maternity leave provision for teachers which fails to consider the physical ability of the individual and which treats pregnancy differently from any other form of disability deprives a pregnant teacher of rights guaranteed under the fourteenth amendment. The complaint sought an order requir-

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1 *ARTICLE XIV—MATERNITY LEAVE*

As soon as any teacher shall become aware of her pregnancy, she shall forthwith apply in writing to the Superintendent of Schools for a maternity leave of absence, and shall accept a leave of absence as provided by the Board of Education.

A maternity leave shall begin not less than four months prior to expected confinement or at such earlier time as a replacement becomes available. The leave shall extend only for the current year. This leave shall also be extended for the following school year for tenure teachers upon written request.

Teachers on maternity leave shall be placed on a waiting list for future appointment and shall have priority for a vacancy. Maternity leave shall not result in loss of accumulated sick leave or loss of tenure. This paragraph does not apply to non-tenure teachers.

Any woman who is aware of her pregnancy prior to August 1, shall only return to school in September at the discretion of the Superintendent.

For convenience, we sometimes refer to Article XIV as the "Board's rule," though we realize that defendant Waterford Education Association is a party to the agreement in which it is set forth.

ing defendants to permit her to teach "until such time as her gynecologist shall deem that she is physically unable to continue to teach, or until January 31, 1972, whichever shall sooner occur"; plaintiff alternatively sought damages for lost salary if forced to leave her job. Chief Judge Blumenfeld denied an application for preliminary injunctive relief on the ground that since money damages would be fully compensatory, there was no showing of possible irreparable injury. Plaintiff properly does not complain of this ruling. Her claim was then limited to damages for loss of salary from November 17, 1971, when her forced maternity leave began, to January 31, 1972. Defendants Board of Education and Cupello, [redacted] moved to dismiss for want of federal jurisdiction because plaintiff "failed to state . . . infringement of a Federally protected right." The judge treated the motion as one for summary judgment under Fed. R. Civ. P. 56[2] and ruled for defendants on the ground that "the maternity leave provision at issue is not so lacking in rational basis as to constitute a denial of equal protection."

II

This quotation from the district judge's opinion brings us to the threshold question of what standard of review to apply in testing the constitutionality of the Board's maternity leave rule. In recent years, the Supreme Court has developed what has been characterized as "a rigid two-

2 Citing *Berman* v. *National Maritime Union*, 166 F. Supp. 327, 332 (S.D.N.Y. 1958), and *Stella* v. *Kaiser*, 82 F. Supp. 301, 312 (S.D.N.Y. 1948), plaintiff claims that the court erred in viewing what was essentially a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (2) as a motion under 12(b)(6) and then treating it as a motion for summary judgment. In view of our disposition of the case, we need not consider this issue.

tier attitude" [3] in equal protection cases. In most instances, statutory or regulatory classifications are presumptively constitutional and will not be disturbed unless they are without rational basis, resting "on grounds wholly irrelevant to the achievement" of some permissible state purpose. *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961); see *Morey* v. *Doud*, 354 U.S. 457, 463-64 (1957). In other cases, however, where the classification is grounded on certain "suspect" criteria, e.g., *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971), or where the classification impinges upon certain "fundamental" rights, e.g., *Griffin* v. *Illinois*, 351 U.S. 12 (1956), "strict" judicial scrutiny is required, and the classification will not stand unless justified by some "compelling governmental interest." E.g., *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969).

Plaintiff strenuously urges that the stringent standard of review is appropriate here. She argues that her case involves both fundamental rights ("the right to work at one's chosen profession . . . [and] the right to bear children")[4] and a classification based on sex, an inherently suspect criterion. The Supreme Court, however, has not yet added sex to the list of suspect classifications[5]—race, nationality, alienage—and while some courts[6] and commen-

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3 Gunther, The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

4 Brief for Appellant at 16.

5 E.g., *Goesaert* v. *Cleary*, 335 U.S. 464 (1949). The question may be expressly decided in *Frontiero* v. *Laird*, 341 F. Supp. 201 (M.D. Ala. 1972) (3-judge court), prob. juris. noted, 41 U.S.L.W. 3165 (U.S. Oct. 10, 1972), argued before the Supreme Court on January 17, 1973, and now sub judice.

6 E.g., *United States ex rel. Robinson* v. *York*, 281 F. Supp. 8, 14 (D. Conn. 1968); *Sail'er Inn, Inc.* v. *Kirby*, 485 P.2d 529, 539-41 (Cal. Sup. Ct. 1971). Cf. *Seidenberg* v. *McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593, 606 (S.D.N.Y. 1970).

tators[7] have concluded otherwise, we accept arguendo the district court's assumption that rational basis scrutiny is the appropriate standard of review in this case. Cf. *Gruenwald* v. *Gardner*, 390 F.2d 591 (2d Cir. 1968).

In several cases from its past Term, however, the Court has suggested that rational basis scrutiny is not so deferential a standard of review as had been previously and generally supposed. First, the Court has apparently narrowed the linguistic gap between the two standards; it has avoided the terminology of two-tiered review in some cases, by posing instead certain fundamental inquiries applicable to "all" equal protection claims.[8] Thus, in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), invalidating a Louisiana workmen's compensation law that discriminated against dependent unacknowledged, illegitimate children, the Court stated, 406 U.S. at 173, that the "essential inquiry" in all equal protection cases is

> inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?[9]

And in *Police Department* v. *Mosley*, 408 U.S. 92 (1972), which held unconstitutional a Chicago ordinance that differentiated between types of peaceful picketing on the basis of subject matter, the Court stated, 408 U.S. at 95:

> As in all equal protection cases, however, the crucial question is whether there is an appropriate govern-

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7 E.g., Note, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?, 84 Harv. L. Rev. 1499, 1507-08 (1971); 1972 Wisc. L. Rev. 626, 632-33.

8 See Gunther, supra note 3, at 17.

9 Justice Powell's opinion for the Court was joined by six other Justices. Justice Blackmun concurred in the result and Justice Rehnquist dissented.

mental interest suitably furthered by the differential treatment. See *Reed* v. *Reed*, 404 U.S. 71, 75-77 (1971); *Weber* v. *Aetna Casualty Co.*, 406 U.S. 164 (1972); *Dunn* v. *Blumstein*, 405 U.S. 330, 335 (1972).[10]

Moreover, the Court seems far less willing to speculate as to what unexpressed legitimate state purposes may be rationally furthered by a challenged statutory classification. Compare *McGowan* v. *Maryland*, *supra*, 366 U.S. at 425-26, with *Gunther*, *supra* note 3, at 33 (discussing *Jackson* v. *Strange*, 407 U.S. 128 (1972)).

Finally, and perhaps most significantly, the Court's definition of what constitutes the necessary rational relationship between a classification and a legitimate governmental interest seems to have become slightly, but perceptibly, more rigorous. While under *McGowan* v. *Maryland*, *supra*, a classification is to be sustained unless it is "wholly irrelevant" to some permissible purpose, cases from the past Term spoke differently. In *Reed* v. *Reed*, 404 U.S. 71 (1971), for example, which struck down a section of the Idaho probate code giving mandatory preference to men over women when competing for the right to administer an estate, Chief Justice Burger stated for a unanimous Court, 404 U.S. at 76:

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having *a fair and substantial relation to the object of the legislation. . . .*" *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a

10 Justice Marshall's opinion for the Court was joined by five other Justices. Justices Blackmun and Rehnquist concurred in the result, and Chief Justice Burger concurred in a separate opinion.

rational relationship to a state objective that is sought to be advanced . . . . [Emphasis added.]

See also *Weber* v. *Aetna Casualty & Surety Co., supra,* 406 U.S. at 175 ("The inferior classification of dependent unacknowledged illegitimates bears . . . no *significant relationship* to those recognized purposes . . . which workmen's compensation statutes commendably serve." [Emphasis added.]); cf. *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972).

With these very recent indications of the proper inquiry in mind, cf. *Aguayo* v. *Richardson,* slip op. 1555, 1588-89 (2d Cir. Jan. 18, 1973), we turn to plaintiff's argument that the Board's maternity leave policy denied her the equal protection of the laws.

III

The heart of plaintiff's case is that disqualifying a physically capable woman from working because of a condition related solely to her sex is unconstitutionally discriminatory. Plaintiff admits the obvious, that men do not become pregnant, but points out that men, being human, are also subject to crises of the body, some of which, like childbirth, give ample warning: A cataract operation or a prostatectomy, for example, may be planned months ahead. Because male teachers are not forced by defendant Board to take premature leave because of a known forthcoming medical problem, female teachers should not be treated differently. Thus stated, the argument is persuasive, even compelling. One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or have gone unnoticed.

But such a visceral reaction, of course, is not the end of the inquiry, although it serves well as the beginning. An equal protection argument requires careful analysis not

only of the effect of the claimed discrimination but also of the degree to which the discriminatory classification furthers legitimate state interests. Defendants in their brief and at oral argument have offered no direct justification for the rigid rule of Article XIV, but rely obliquely on "the several cases considering the problem of maternity leave clauses." [11] Indeed, we note that a principal problem on this appeal is an altogether abbreviated record, consisting of little more than plaintiff's verified complaint, defendant's answer, a few short interrogatories, the argument on the motion for a preliminary injunction, and the district judge's opinion. We thus have no assurance that any legitimate interest arguably promoted by the rule has been identified or articulated by the Board. Cf. *Gunther, supra* note 3, at 47. But giving defendants the benefit of the doubt, we will examine the rationality of the maternity leave rule in relation to those state interests principally suggested by Judge Blumenfeld: "concern for the [health and] safety of the teacher and her unborn child," continuity of education, and administrative convenience.

As to the Board's possible concern with health, plaintiff asked to remain on the job only "until such time as her gynecologist shall deem that she is physically unable to continue to teach, or until January 31, 1972, whichever shall occur sooner," [12] so that her health or that of the unborn child would presumably not have been endangered had she continued to teach. At the hearing on a preliminary injunction, plaintiff was apparently prepared to support her claim with "Medical evidence regarding competency of a pregnant woman"; [13] while there is an intimation that de-

11 Brief for Appellees at 15.

12 Plaintiff's motion for preliminary injunction, at 1.

13 Transcript of hearing of November 17, 1971, at 3.

fendants intended to offer contrary evidence,[14] this was not done. Why the Board should choose, by means of an inflexible rule, to manifest particular concern with the health of a pregnant woman, but not, for example, with the health of a teacher (male or female) recuperating from a heart attack is nowhere explained. In any event, we see little rationality in a rule that purports for reasons of health alone to treat all pregnancies alike rather than on a case-by-case basis. Cf. *Corsover* v. *Board of Examiners*, 298 N.Y.S. 2d 757 (Sup. Ct. Kings Co. 1968). We do not suggest that the Board would be bound by the judgment of plaintiff's doctor, but there was no individual assessment here of plaintiff's ability to continue to work.

As to safety, it is depressingly true these days that violence from students is a possibility, not pure fancy. Whether that possibility justifies treating pregnant teachers differently from male teachers is highly questionable. When the comparison is with other female teachers, any justification for focusing solely on those who are pregnant is still more dubious in the abstract and wholly so on this record.[15] See Comment, Mandatory Maternity Leave of Absence Policies—An Equal Protection Analysis, 45 Temple L.Q. 240, 245 (1972). Furthermore, any rational rule motivated by interests in safety should logically take account of variations in the location of schools and in the age of students; the Board's maternity leave provision does not do so. An additional state interest—avoiding "classroom distractions" caused by embarrassed children "pointing, giggling, laughing and making snide remarks" about their teacher's condition—emerges from one of "the several

14 Id. at 12.

15 One of defendants' interrogatories to plaintiff asked whether she was "ever threatened or physically abused by any students." Plaintiff replied that she had once been slapped in the face by a female student, without injury.

cases" to which defendants refer.[16] We regard any such interest as almost too trivial to mention; it seems particularly ludicrous where, as here, plaintiff taught only high school students. Whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word.

The only substantial justifications for the Board's maternity leave rule relate to continuity of classroom education and to administrative efficiency and convenience. As to these, the district judge said:

> The plaintiff acknowledges that at some point prior to the birth of her child she would have had to take a maternity leave. It is not irrational that, in order to achieve an orderly transition between teachers, the Board of Education required substantial advance notice of her termination date. That the board, with the concurrence of the teachers' association, chose to fix that date at the end of five months of pregnancy was well within the bounds of reason. It was not required to go through a "battle of obstetricians" in each case to determine when a particular teacher would be required to leave before it could locate a replacement teacher and offer her a definite starting date.

Continuity of instruction is surely an important value. Where a pregnant teacher provides the Board with a date certain for commencement of leave, however, that value is preserved; an arbitrary leave date set at the end of the fifth month is no more calculated to facilitate a planned and orderly transition between the teacher and a substitute than is a date fixed closer to confinement. Indeed, the

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16 *La Fleur* v. *Cleveland Bd. of Educ.*, 326 F. Supp. 1208, 1210, 1213 (N.D. Ohio 1971). As we note below, this decision was reversed by the Court of Appeals for the Sixth Circuit.

latter—as was the case here—would afford the Board more, not less, time to procure a satisfactory long-term substitute.[17] There remains, of course, the possibility of premature childbirth or complications in the late stages of pregnancy, eventualities which might upset the best-laid plans of the teacher, the scheduled substitute, and the school board. However, there is nothing to indicate that these would be more than isolated instances. The Board must have substitute teachers generally available to replace any teacher suddenly incapacitated by acute illness or by any number of other causes. Any conclusion that these substitutes could not handle additional, pregnancy-related emergencies is pure speculation on this record. We do not denigrate the Board's interest in providing "orderly transition between teachers," but the relationship between the maternity leave rule and that interest seems insufficiently "fair and substantial" to pass constitutional muster.

Turning to the additional administrative convenience suggested of avoiding many "battles of obstetricians," we put to one side the thought that the district court's analysis could as well justify a much harsher rule, requiring maternity leave to start at the end of three months of pregnancy, or two. More to the point, a disagreement between physicians may arise any time a teacher's medical problems might, in the eyes of the school administration, inhibit satisfactory performance of classroom obligations at some point in the future; yet the Board apparently chose to avoid medical "battles" only in the case of pregnancy. The obvious rejoinder is that pregnant teachers

17 We also note that in any school operating under a semester system, plaintiff's departure on January 31 would be less disruptive of classroom continuity than a leave required, as here, to commence mid-semester. At oral argument, however, defendants claimed that Waterford had no formalized semester system. We are without sufficient factual data to accept or reject defendants' assertion.

constitute by far the most numerous group among those who might require medical leave and that the Board could, therefore, legitimately deal with the problem on a class, rather than on an individual, basis. Apart from the speculation of the district court, however, there is nothing in the record to support this proposition; on the contrary, we are told that the maternity leave rule has been recently amended precisely to provide for such individualized treatment. Even more significantly, *Reed* v. *Reed, supra,* indicates that the state interest in this sort of administrative convenience is not enough to justify an otherwise irrational statutory differentiation of the sexes. The Court there recognized that "the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy." 404 U.S. at 76. Nevertheless, it held that "[t]o give a mandatory preference [as administrators of estates] to members of either sex over members of the other, *merely to accomplish the elimination of hearings on the merits . . .*" (emphasis added), was forbidden by the equal protection clause. *Id.* While it might be easier for the Board to handle all maternity leave problems on an arbitrary, blanket basis, a reduced administrative workload is constitutionally insufficient to sustain this discriminatory treatment of pregnant women. See *Carrington* v. *Rash,* 380 U.S. 89, 96 (1965); cf. *Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972).

From the foregoing analysis, we conclude that the Board's maternity leave rule, which arbitrarily forces a physically capable woman like plaintiff to leave her job before required to do so for medical reasons, is discriminatory and that there are no "legitimate state interests" which the rule's rigid classification sufficiently promotes to justify such discriminatory treatment. This conclusion would not prevent the Board from considering the question

of leave for pregnant teachers on an individual basis as it apparently now does for non-pregnant teachers, female or male. We hold only that the particular Board rule before us denies plaintiff the equal protection of the laws.

Our conclusion is not altered by an examination of the decisions of other courts. Two closely divided courts of appeals, considering teacher maternity leave provisions substantially similar to the one before us, have reached diametrically opposite conclusions. Compare *LaFleur* v. *Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972) (2-1 decision) (mandatory leave provision is unconstitutional), rev'g 326 F. Supp. 1208 (N.D. Ohio 1971), petition for cert. filed, 41 U.S.L.W. 3315 (U.S. Nov. 27, 1972) (No. 72-777), with *Cohen* v. *Chesterfield County School Board*, —— F.2d —— (4th Cir. Jan. 15, 1973) (en banc; 4-3 decision) (contra), rev'g 326 F. Supp. 1159 (E.D. Va. 1971). In addition, in *Schattman* v. *Texas Employment Commission*, 459 F.2d 32, 38-41 (5th Cir. 1972), cert. denied, 41 U.S.L.W. 3372 (U.S. Jan. 8, 1973), the court held that a rule requiring pregnant employees to take a leave (without assurance of reinstatement) no later than "two months before the expected delivery date" did not deny equal protection.[18] Federal district courts in Illinois, Florida, New York, and California have reached the same result as we do with respect to comparable maternity leave rules. *Bravo* v. *Board of Education*, 345 F. Supp. 155 (N.D. Ill. 1972); *Pocklington* v. *Duval County School Board*, 345 F. Supp. 163 (M.D. Fla. 1972); *Monell* v. *Department of Social Services*, 4 CCH Empl. Prac. ¶ 7765 (S.D.N.Y. Apr. 12, 1972); *Williams* v. *San Francisco Unified School District*,

18 Judge Wisdom, dissenting from the majority's first holding, that plaintiff's employer was not covered by Title VII, 42 U.S.C. § 2000e (b)(1), would have found a violation of that Act and did not reach the constitutional question. 459 F.2d at 41-43.

340 F. Supp. 438 (N.D. Cal. 1972) (non-teacher employee).[19] In *Struck* v. *Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), vacated and remanded for consideration of mootness, 41 U.S.L.W. 3346 (U.S. Dec. 18, 1972), the Ninth Circuit upheld against an equal protection claim an Air Force regulation providing for discharge of pregnant women officers;[20] contra, *Robinson* v. *Rand*, 340 F. Supp. 37 (D. Colo. 1972). Obviously, the authorities are split, and for reasons already stated we prefer to align ourselves with those exemplified by the decision of the Sixth Circuit in *LaFleur*.

In sum, we conclude that plaintiff's complaint states a denial of equal protection of the laws and that summary judgment for defendants was erroneously granted. This, of course, does not end the case. Defendants have raised

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19 Plaintiff cites guidelines and cases promulgated and decided under fair employment statutes. These not only emphasize the limited impact of our holding, *LaFleur*, *supra*, 465 F.2d at 1186, but provide additional support. Thus, Guidelines recently promulgated by the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-15, provide that an employment policy which excludes applicants or employees from employment due to pregnancy is prima facie in violation of the statute. § 1604.10(a), 37 Fed. Reg. 6837 (Apr. 5, 1972). The Guidelines further provide that questions of maternity leave are to be treated as would leave for other temporary disabilities. Id. § 1604.10(b). Title VII has been recently amended to apply to public school employees. Pub. L. 92-261, § 2 (Mar. 24, 1972). State agencies have reached similar results by way of adjudication. E.g., *Staten* v. *East Hartford Bd. of Educ.*, 1 CCH Empl. Prac. Guide § 5055, at 3113-15 [loose-leaf service] (Conn. Comm'n on Human Rights and Opportunities, Mar. 28, 1972).

20 On a petition for rehearing, Judge Duniway dissented, though he had originally concurred in the majority opinion; he believed reversal was compelled by the Supreme Court's decision in *Reed* v. *Reed*, *supra*, handed down one week after the majority opinion. See 460 F.2d at 1378-80. One Pennsylvania court has sustained a teacher maternity provision requiring termination of employment. *Cerra* v. *East Stroudsburg Area School Dist.*, 4 CCH Empl. Prac. ¶ 7607 (Pa. Comm. Ct. 1971).

additional defenses not yet considered by the court below. In addition, the amount of damages, if any, to which plaintiff is entitled remains to be determined. We thus remand for further proceedings consistent with this opinion.

Reversed and remanded.

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APPENDIX B

[394]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CHERYL CERRA,
Appellant

v.

EAST STROUDSBURG AREA SCHOOL DISTRICT,
Appellee

No. 359 January Term 1972

Appeal from the Order of the Commonwealth Court to No. 445 C.D. 1971, affirming the Order of the Court of Common Pleas of Monroe County to No. 309 October Term 1970

Entered: April 4, 1972

OPINION OF THE COURT

EAGEN, J. Filed: January 19, 1973

In September 1965, Cheryl Cerra, a married female, was employed by the East Stroudsburg School District in Monroe County [District] as a temporary professional employee. On June 20, 1967, upon the completion of two years of satisfactory service as a fourth-grade teacher, Mrs. Cerra entered into a written contract with the District under which she was given tenure. On July 17, 1967, the Board of School Directors of the District [Board] adopted a regulation requiring " . . . . that any employee who becomes pregnant shall resign effective not later than the end of the fifth (5th) month of the pregnancy; . . . . " On May 22, 1970, Mrs. Cerra received notice from the Superintendent of Schools of the District

that her employment was terminated immediately because she was more than five months pregnant.[1] On June 29, 1970, after an evidentiary hearing, the Board passed a resolution sustaining the termination of Mrs. Cerra's contract, [394-2] because: (a) of willful and persistent disobedience of a proper regulation of the Board, specifically, the regulation requiring resignation in the event of pregnancy; and (b) during the month of May 1970, "she lacked the physical ability or physical fitness to perform the required duties incident to her employment of teaching." Mrs. Cerra's offer to return to her employment with the District at the beginning of the new school term in September 1970 was refused.

Mrs. Cerra filed a timely appeal from the Board's resolution with the Secretary of Education of the Commonwealth [Secretary], who, subsequently, filed an opinion and order sustaining the Board's action solely on the ground Mrs. Cerra had persistently and willfully violated the regulation of the Board, requiring her to resign because of pregnancy. In his opinion the Secretary specifically stated the record " . . . fails to substantiate a charge of incompetency."

Mrs. Cerra then filed a petition for appeal from the Secretary's order in the Court of Common Pleas of Monroe County, pursuant to the provisions of Section 1132 of the Public School Code, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §11-1132.[2] After a hearing

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[1]Mrs. Cerra gave birth to a child on July 27, 1970, after a normal term of gestation.

[2]Mrs. Cerra simultaneously instituted an action in assumpsit for salary due under her contract of employment with the District. A jury trial was waived and, after the testimony of the plaintiff was received, the transcript of the testimony taken at the hearing before the Board was made part of the record. In this action, the court entered judgment for the District.

wherein the transcript of the testimony heard by the Board was made a part of [394-3] the record, the court "dismissed" Mrs. Cerra's appeal. In its opinion the court ruled Mrs. Cerra's contract was properly terminated, both on the ground of incompetency and persistent and willful violation of the Board's regulation as to pregnancy.

Mrs. Cerra then filed an appeal in the Commonwealth Court which later affirmed the order of the Court of Common Pleas.[3] Judges Mencer and Kramer filed dissenting opinions. See 3 Commonwealth Court 665, 285 A.2d 206 (1972). We granted allocatur and now reverse.

Under the Public School Code of Pennsylvania, supra, specifically, Art. V, §510, 24 P.S. §5-510, the board of school directors in any school district "may adopt and enforce such reasonable rules and regulations as it may deem necessary" regarding the conduct and deportment of all teachers during the time they are engaged in their duties to the district. However, under the Code, specifically, Section 1122, 24 P.S. §11-1122, a teacher's contract of employment may be terminted by the board only on certain specified grounds.[4] Instantly, [394-4] the Board attempted to justify the termination of Mrs. Cerra's contract on two grounds, included in Section

[3] The majority opinion of the Commonwealth Court restricted its discussion to the legality and reasonableness of the Board's regulation requiring a teacher to resign in the event of pregnancy.

[4] Section 1122 of the Act of 1949, pertinently states in part:

> "The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employee shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, advocation of or participation in un-American or subversive doctrines, persistent and wilful violation of the school laws of this Commonwealth on the part of the professional employee . . . ."

1122 of the Code, namely, incompetency and willful violation of its school laws, specifically, her refusal to resign because of pregnancy, as required by the Board's regulation. For the reasons that follow we conclude the action of the Board was contrary to law.

While "incompetency" is a valid reason for the termination of a professional employee's contract with a school district (see Section 1122 of the Act of 1949, supra) a physical disability which results only in a teacher's temporary absence from his or her duties is not such incompetence as the statute contemplates. Otherwise, a temporary absence from service for an appendectomy, for example, would be such incompetence as to justify the termination of a teacher's contract. The statute intended no such unrealistic meaning of "incompentency."

The finding of the Secretary that the instant record "fails to substantiate the charge of incompetency" was eminently correct. According to the uncontradicted testimony, Mrs. Cerra performed her teaching duties satisfactorily and continuously until May 22, 1970, when her services were suspended by the District's superintendent. This was twelve days prior to the end of the 1969-1970 school term. It is also undisputed in the record that as of September 1970, the beginning of the school term for 1970-1971, Mrs. Cerra was physically and mentally fit to resume her teaching duties. Even assuming during the month of May 1970, Mrs. Cerra "lacked . . . the physical fitness . . . to perform the required duties incident to her employment of teaching," this, in itself, is not "incompetency" under the Code.

The Court of Common Pleas in sustaining the Board's finding [394-5] of incompetency relied mainly on *Brown's Case*, 151 Pa. Superior Ct. 522, 30 A.2d 726

(1943), aff'd 347 Pa. 418, 32 A.2d 565 (1943). However, in *Brown* the dismissal was not because of pregnancy, but rather because the teacher "became incompetent (*for an extended period*) due to her physical incapacity to discharge her duties." The instant record fails to justify such a finding.

The issue of incompetency need not detain us further for it is abundantly clear from the record that the true reason for Mrs. Cerra's dismissal was her refusal to resign at the end of the fifth month of her pregnancy, as required by the Board's regulation. Hence, the real issue posed by their appeal is the legality of the Board's action in termining Mrs. Cerra's contract for refusing to resign in accordance with this specific regulation. We have no hesitancy in reaching the conclusion that the Board's action was violative of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §955(a), and, therefore, was illegal. In view of this conclusion, it is unnecessary to determine if Mrs. Cerra's rights to Equal Protection and Due Process under the Fourteenth Amendment to the United States Constitution were also violated. But see and compare, *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972), and *Cohen v. Chesterfield County School Board*, 326 F. Supp. 1159 (E.D. Va. 1971), aff'd ____ F.2d ____ (4th Cir. 1972).[5]

[394-6] The Act of 1955, supra, forbids discrimination in employment on the basis of race, color, religious

[5]For a scholarly discussion of the constitutional problems involved, see also Mandatory Maternity Leave of Absence Policies, An Equal Protection Analysis, 45 Temple Law Quarterly, 240 (1972).

creed, ancestry, age, sex or national origin.[6] School Districts are subject to the Act. See 43 P.S. §954(b).

As noted before, Mrs. Cerra's contract was terminated absolutely, solely because of pregnancy. She was not allowed to resume her duties after the pregnancy ended, even though she was physically and mentally competent. There was no evidence that the quality of her service as a teacher was or would be affected as a result of the pregnancy. Male teachers, who might well be temporarily disabled from a multitude of illnesses, have not and will not be so harshly treated. In short, Mrs. Cerra and other pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple.

While it is true that Section 5 of the Act of 1955, supra, (43 P.S. §955) includes an exception to the proscriptions against discriminatory practices, when such practices are based on a bona [394-7] fide occupational qualification, the record fails to substantiate such a bona fide qualification in this case. Cf. *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 840 (1971); *Weeks v. Southern Bell*, 408 F.2d 228 (5th Cir. 1969); and *Bowe v. Colgate Palmolive*, 416 F.2d 711 (7th Cir. 1969).

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[6] In relevant part, the Act of 1955 provides:

"It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification . . . (a) For any employer because of race, color, religious creed, ancestry, age, sex or national origin of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, . . ."

It is argued that the regulation involved is proper because it insures continuity in class-room instruction and alleviates burdensome administrative problems. But, these problems are not confined to pregnancy cases. They also flow from the absence from duty of any teacher suffering any temporary disability, even that disability incident to the common cold. Moreover, efficiency is not the only value to be considered. See *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972).

The orders of the courts below are reversed, and the record is remanded to the court of original jurisdiction with directions to proceed consonantly with this opinion.

Mr. Chief Justice Jones did not participate in the consideration or decision of this case.